

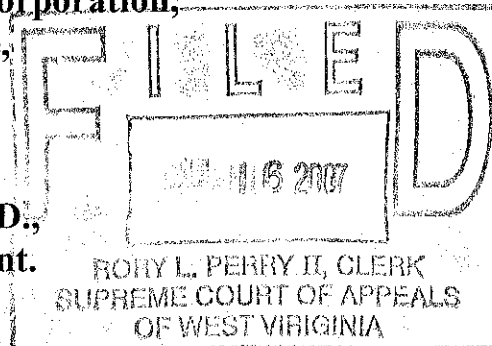
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 33309**

**HIGHMARK WEST VIRGINIA INC. d/b/a  
MOUNTAIN STATE BLUE CROSS  
BLUE SHIELD, a West Virginia Corporation,  
Plaintiff Below, Appellee,**

**v.**

**SHAROOZ S. JAMIE, M.D.,  
Defendant Below, Appellant.**



**BRIEF OF APPELLEE**

**Ancil G. Ramey, Esquire (WVSB #3013)  
Kara L. Cunningham, Esquire (WVSB #8148)  
Russell D. Jessee, Esquire (WVSB #10020)  
STEPTOE & JOHNSON PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588  
Telephone (304) 353-8112**

***Counsel to Appellee***

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. STATEMENT OF FACTS .....	2
III. STANDARD OF REVIEW .....	7
IV. ARGUMENT .....	9
A. None of Dr. Jamie's Counterclaims State Viable Causes of Action .....	9
1. Because Dr. Jamie Cannot Bring Claims on Behalf of His Patients, Two of His Claims Fail for Lack of Standing .....	9
2. Because the Alleged Defamatory Statement Does Not Satisfy the Elements of any Cause of Action, Dr. Jamie's Defamation Claim Fails as a Matter of Law .....	12
3. Dr. Jamie's Fraud Counterclaims Fail to Assert Facts, With the Requisite Particularity, that Would Constitute Actionable Fraud .....	15
4. Dr. Jamie's "Negligence" Counterclaim Is Not Predicated Upon Any Common Law Duty Owed by Mountain State, But Instead Is based Solely Upon Contractual Provisions .....	17
5. The Implied Covenant of Good Faith and Fair Dealing is Not a Cause of Action Independent from a Cause of Action for Breach of Contract .....	19
6. W. Va. Code § 33-45-2 Has No Application to the Circumstances of This Case .....	20
7. Dr. Jamie Failed to State Any Breach of Contract Claim .....	21
B. The Circuit Court Properly Dismissed Dr. Jamie's Counterclaims with Prejudice .....	23

1.	Dr. Jamie Failed to Preserve the Dismissal With Prejudice Issue for Appeal .....	23
2.	A Rule 12(b)(6) Dismissal May be Effectuated With Prejudice .....	24
V.	CONCLUSION .....	25

## TABLE OF AUTHORITIES

### CASES

<i>Adkins v. Aetna Life Ins. Co.</i> , 130 W. Va. 362, 43 S.E.2d 372 (1947) .....	22
<i>Bell Atlantic Corp. v. Twombly</i> , ___ U.S. ___, 127 S.Ct. 1955 (2007) .....	8, 9, 25
<i>Bell v. National Republican Congressional Committee</i> , 187 F.Supp.2d 605 (S.D. W. Va. 2002) .....	14
<i>Cogar v. Lafferty</i> , 219 W. Va. 743, 639 S.E.2d 835 (2006) .....	7
<i>Conley v. Gibson</i> , 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) .....	9
<i>Craddock v. Apogee Coal Co.</i> , 166 Fed. Appx. 679 (4 <sup>th</sup> Cir. 2006) .....	11
<i>Crump v. Beckley Newspapers, Inc.</i> , 173 W. Va. 699, 320 S.E.2d 70 (1984) .....	12
<i>Elmore v. State Farm Mut. Auto. Ins. Co.</i> , 202 W. Va. 430, 504 S.E.2d 893 (1998) .....	11
<i>E. Steel Constructors, Inc. v. City of Salem</i> , 209 W. Va. 392, 549 S.E.2d 266 (2001) .....	11
<i>Findley v. State Farm Mut. Auto. Ins. Co.</i> , 213 W. Va. 80, 576 S.E.2d 807 (2002) .....	10
<i>Foman v. Davis</i> , 371 U.S. 178 (1962) .....	25
<i>Gerver v. Benavides</i> , 207 W. Va. 228, 530 S.E.2d 701 (1999) .....	16
<i>Hager v. Exxon Corp.</i> , 161 W. Va. 278, 241 S.E.2d 920 (1978) .....	15

<i>Hartmann v. Windsor Hotel Co.,</i> 132 W. Va. 307, 52 S.E.2d 48 (1949) .....	11
<i>Homes v. Monongahela Power Co.,</i> 136 W. Va. 877, 69 S.E.2d 131 (1952) .....	18
<i>Maynard v. Daily Gazette Co.,</i> 191 W. Va. 601, 447 S.E.2d 293 (1994) .....	12
<i>Miller v. City Hospital, Inc.,</i> 197 W. Va. 403, 475 S.E.2d 495 (1996) .....	13, 14
<i>Miller v. Mass. Mut. Life Ins. Co.,</i> 193 W. Va. 240, 455 S.E.2d 799 (1995) .....	19
<i>Pettus v. Olga Coal Co.,</i> 137 W. Va. 492, 72 S.E.2d 881 (1952) .....	11
<i>Rhododendron Furniture &amp; Design v. Marshall,</i> 214 W. Va. 463, 590 S.E.2d 656 (2003) .....	24
<i>Rosenbaum v. Price Const. Co.,</i> 117 W. Va. 160, 184 S.E. 261 (1936) .....	19
<i>Silk v. Flat Top Const., Inc.,</i> 192 W. Va. 522, 453 S.E.2d 356 (1994) .....	17
<i>Sprouse v. Clay Communication, Inc.,</i> 158 W. Va. 427, 211 S.E.2d 674 (1975) .....	24
<i>State v. Browning,</i> 199 W. Va. 417, 485 S.E.2d 1 (1997) .....	23
<i>State ex rel. Leung v. Sanders,</i> 213 W. Va. 569, 584 S.E.2d 203 (2003) .....	10
<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,</i> 194 W. Va. 770, 461 S.E.2d 516 (1995) .....	8
<i>State Rd. Comm'n v. Ferguson,</i> 148 W. Va. 742, 137 S.E.2nd 206 (1964) .....	23

<i>Sticklen v. Kittle</i> , 168 W. Va. 147, 287 S.E.2d 148 (1981) .....	8
<i>Tobin v. Ravenswood Aluminum Corp.</i> , 838 F. Supp. 262 (S.D. W. Va. 1993) .....	19
<i>United Roasters, Inc. v. Colgate-Palmolive Co.</i> , 649 F.2d 985 (4 <sup>th</sup> Cir. 1981) .....	20
<i>United States Fidelity and Guaranty Company v. Eades</i> , 150 W. Va. 238, 144 S.E.2d 703 (1965) .....	24
<i>Wimer v. Hinkle</i> , 180 W. Va. 660, 379 S.E.2d 386 (1989) .....	23

#### STATUTES AND RULES

Tr. Ct. R. 6.01 .....	5
Tr. Ct. R. 6.03 .....	5
W. Va. Code § 33-45-2 .....	17, 20, 21
W. Va. Code § 46-1-304 .....	19
W. Va. Code § 55-8-12 .....	10
W. Va. R. Civ. P. 6(d) .....	5
W. Va. R. Civ. P. 8(a) .....	9
W. Va. R. Civ. P. 8(e) .....	18
W. Va. R. Civ. P. 9(b) .....	15, 16
W. Va. R. Civ. P. 12(b) .....	7, 8, 9, 24
W. Va. R. Civ. P. 54(b) .....	6
W. Va. R. Civ. P. 56 .....	24
W. Va. R. Civ. P. 59(e) .....	6, 7

MISCELLANEOUS

F. Cleckley, R. Davis, L. Palmer, *Litigation Handbook on West Virginia  
Rules of Civil Procedure* 2D at § 12(b)(6)[2][a] (2006) ..... 24

## I. INTRODUCTION

This is the brief of the Appellee, Highmark West Virginia, Inc., d/b/a Mountain State Blue Cross Blue Shield [Mountain State], in an appeal by the Appellant, Sharooz S. Jamie, M.D. [Dr. Jamie], from an order dismissing counterclaims asserted in response to a suit by Mountain State seeking to recover overpayments made to Dr. Jamie as a consequence of his fraudulent and/or negligent billing practices.

Since November 2003, Dr. Jamie he has engaged in a long line of tactics to delay repayment of tens of thousands of dollars he wrongfully received. There is no dispute that Dr. Jamie received overpayments from Mountain State. Although Dr. Jamie denies that his billing practices were fraudulent, he does not dispute that he received overpayments, at a minimum, because of errors or mistakes in his office. In response to Mountain State's suit, Dr. Jamie asserted various and sundry counterclaims in an apparent effort to increase the time and expense required of Mountain State. The Circuit Court, however, properly dismissed these counterclaims as each failed to state a viable cause of action upon which relief could be awarded.

First, Dr. Jamie lacked standing to institute some of his counterclaims. Second, some of his counterclaims failed to state any cause of action upon which relief could be awarded. Finally, some of his counterclaims were predicated upon causes of action which do not exist or do not apply under the circumstances.

After the Circuit Court initially dismissed Dr. Jamie's counterclaims, he did not appeal; rather, he filed a motion to alter or amend the dismissal order. Rather than bringing on his motion for hearing, however, he waited for five months as discovery progressed and the case moved forward on Mountain State's claims to recoup overpayments. Then, on the eve of trial, Dr. Jamie sought reconsideration of the Circuit Court's earlier dismissal. Once the Circuit Court

refused to reconsider its earlier dismissal, Dr. Jamie appealed, but Mountain State submits the dismissals should be affirmed.

## II. STATEMENT OF FACTS

Mountain State filed its Complaint in this matter on December 22, 2004, in the Circuit Court of Wood County, alleging breach of contract, unjust enrichment, and fraud arising out of improper billing practices by Dr. Jamie for medical services allegedly provided by him to patients covered by Mountain State's health plans.<sup>1</sup> Mountain State's Complaint also contained a claim for specific performance and injunctive relief, because for more than a year Dr. Jamie refused to allow Mountain State to review records underlying his claims for payment.<sup>2</sup>

The claims forms that Dr. Jamie submitted to Mountain State, on their face, revealed that he greatly overbilled Mountain State for blood test panels.<sup>3</sup> Rather than bill for a single unit of a panel, as the industry-wide coding and billing guidelines specified, and as Dr. Jamie was contractually obligated to do, Dr. Jamie would claim to have performed fourteen or nineteen separate panels.<sup>4</sup>

Each time that Dr. Jamie wrongfully billed Mountain State for multiple units of a single blood test panel, he would be overpaid approximately \$340 or \$760 for panels that cost less than \$40 to perform.<sup>5</sup> Significantly, Dr. Jamie's practice of billing for thirteen or eighteen more panels than he performed was contrary to his own prior billing practices.<sup>6</sup> Dr. Jamie began overbilling for blood test panels on a large scale in 2002 and increased the practice in 2003, so

---

<sup>1</sup> See generally Compl.

<sup>2</sup> *Id.* at Count III.

<sup>3</sup> *Id.* at ¶¶ 13-25.

<sup>4</sup> *Id.* at ¶¶ 14-20.

<sup>5</sup> *Id.* at ¶ 21.

<sup>6</sup> *Id.* at ¶ 20.

that in those two years he claimed and was overpaid approximately \$83,000 from Mountain State.<sup>7</sup> Mountain State later learned in deposition that Dr. Jamie claims to have lost more than \$3 million in the stock market between 2000 and 2003, trading the stocks of “corrupt corporation[s] of [the] USA.”<sup>8</sup> This gives rise to an inference that the reason he changed his billing practices to seek multiple payments for a single blood draw was to deal with personal financial problems.

Dr. Jamie’s Second Amended Counterclaim admits that he overbilled: “Dr. Jamie’s employees through mistake and/or clerical error entered 19 units, which was supposed to be 1 [one] unit.”<sup>9</sup> Thus, Dr. Jamie admits that he was not entitled to be paid for eighteen extra panels each time he performed one. Furthermore, the proffered reason for overbilling – “mistake and/or clerical error” – is irrelevant to Mountain State’s claims of breach of contract and unjust enrichment, because the mistake or error originated with Dr. Jamie’s office.<sup>10</sup> In short, Dr. Jamie has conceded that he is liable for receiving tens of thousands of dollars that he did not earn, but he refuses to repay the money to Mountain State.

---

<sup>7</sup> *Id.* at ¶ 22.

<sup>8</sup> Jamie Tr. II at 153:14-154:10; *see also* Jamie Tr. I at 87:14-88:1. Pertinent excerpts of Dr. Jamie’s deposition testimony are attached hereto as Exhibit A.

<sup>9</sup> Second Amended Counterclaim at ¶ 33. Dr. Jamie’s Second Amended Counterclaim is attached hereto as Exhibit B for ease of reference.

<sup>10</sup> In the interest of a complete understanding of this case, the Court should be aware that Dr. Jamie has further admitted in deposition that he overbilled Mountain State “[b]ecause [he] was losing money.” (Jamie Tr. II at 74:13.) He thought that Mountain State’s and other insurers’ payments for blood test panels were too low, so “[he had] to compensate for it.” (*Id.* at 74:13-19.) He also testified, “I explained to begin with 95 percent I am losing money on 80053. *Someone has to pay for it.*” (Jamie Tr. II at 103:12-14)(emphasis added).)

In response to Mountain State's Complaint, Dr. Jamie initially appeared *pro se* and filed both an Answer and a Counterclaim.<sup>11</sup> Nine months after filing his Answer and Counterclaim, Dr. Jamie obtained counsel, a California lawyer named Andy Van Le who improperly applied for *pro hac vice* admission without a certification by local counsel.

On November 3, 2005, Van Le moved to amend Dr. Jamie's original Counterclaim.<sup>12</sup> Less than a month later, on December 1, 2005, Dr. Jamie again moved to amend his Counterclaim.<sup>13</sup> The Second Amended Counterclaim, which was filed in January 2006, asserted ten counterclaims, including breach of contract, fraud, negligence, slander, and various statutory violations.

On February 3, 2006, Mountain State filed a motion to dismiss the Second Amended Counterclaim, arguing that Dr. Jamie had failed to state a claim upon which relief could be granted and asking that his counterclaims, now in their third incarnation, be dismissed with prejudice.<sup>14</sup> On the same date, Mountain State served Dr. Jamie's counsel with notice of the hearing, which was set for 11:00 a.m. on February 23, 2006. Dr. Jamie waited for almost three weeks, until approximately 4:00 p.m. on February 21, 2006, less than forty-eight hours before

---

<sup>11</sup> On January 13, 2005, Dr. Jamie, appearing *pro se*, filed a document styled "Complaint" in response to the Complaint filed by Mountain State on December 22, 2004. The Wood County Circuit Clerk's Office docketed Dr. Jamie's Complaint as an Answer and Counterclaim. The pleading does not separately identify which factual allegations pertain to the Counterclaim, however, and does not contain paragraph numbers. Mountain State, in order to be scrupulously fair to Dr. Jamie, assigned paragraph numbers to all of the allegations of Dr. Jamie's Answer and Counterclaim, and responded to the allegations as if they were all part of the Counterclaim.

<sup>12</sup> See Motion for Leave of Court to File First Amended Counterclaim.

<sup>13</sup> Dr. Jamie's Motion for Leave to File [Second] Amended Counterclaim was "signed" in computer-generated script by Mr. Van Le and Jeffrey Davis, as local counsel. See Motion for Leave to File [Second] Amended Counterclaim.

<sup>14</sup> See Motion to Dismiss by Plaintiff/Counter-Defendant Mountain State.

the scheduled hearing, to file his opposition by facsimile and provide it to opposing counsel by e-mail. Accordingly, Dr. Jamie's opposition brief was untimely.<sup>15</sup>

At the beginning of the February 23, 2006 hearing, counsel for Dr. Jamie – by that time, the law firm of Goodwin & Goodwin<sup>16</sup> – provided the circuit court with a copy of Dr. Jamie's opposition brief.<sup>17</sup> The Circuit Court requested that Dr. Jamie's counsel provide an oral explanation of his opposition to the motion to dismiss. Counsel responded that Dr. Jamie had various defenses for the various counts, but declined the Circuit Court's offer to explain them in full at that time. The Circuit Court nonetheless gave him a second opportunity to do so, and heard argument on each count individually.<sup>18</sup>

During the hour-long hearing, which generated forty-seven transcript pages, the Circuit Court heard extensive argument on each of Dr. Jamie's nine counterclaims that remained after he voluntarily withdrew his tenth counterclaim, alleging a RICO violation. At the conclusion of the hearing, the Circuit Court instructed Mountain State's counsel to draft a simple order to reflect the dismissal of the nine counterclaims. Mountain State submitted the proposed order, which the Circuit Court entered on February 27, 2006.<sup>19</sup>

---

<sup>15</sup> See R. Civ. P. 6(d)(2)(B), 6(d)(3) (requiring service of response to motion “at least 2 days before the time set for the hearing” if served by fax, and filing of response to motion “at least 2 days before the hearing”) (emphasis added); see also Tr. Ct. R. 6.01(c) (requiring pleadings to be filed at least 48 hours prior to “oral presentation or argument of a proceeding”). The copy of Dr. Jamie's opposition brief faxed to the Judge was likewise untimely. See Tr. Ct. R. 6.03 (copy of each memorandum shall be filed with judge).

<sup>16</sup> By that time, as well, the Circuit Court had stricken Mr. Van Le's admission *pro hac vice* for failure to adhere to the Rules for the Admission to Practice Law. Mr. Van Le then reapplied for admission *pro hac vice*, which the Circuit Court granted, given the willingness of Goodwin & Goodwin, to serve as local counsel.

<sup>17</sup> Feb. 23, 2005 Hearing Tr. at 2:10-15.

<sup>18</sup> *Id.* at 3:10-18. Dr. Jamie therefore has no basis on which to assert that the Circuit Court did not fully consider his arguments. See Appellant's Br. at 2.

<sup>19</sup> Mountain State first prepared a proposed order that stated, “[T]he Motion to Dismiss by Plaintiff/Counter-Defendant Mountain State should be granted in its entirety for the reasons stated in the

On March 8, 2006, Dr. Jamie filed his Motion to Alter or Amend Court Order pursuant to R. Civ. P. 59(e). Dr. Jamie did not, however, schedule a hearing on his motion. In the following months, the parties took numerous depositions, supplemented discovery responses, propounded and responded to additional discovery, and argued a motion to compel by Mountain State and a cross-motion for protective order by Dr. Jamie – all relating to Mountain State’s claims, and not to Dr. Jamie’s counterclaims. Moreover, Dr. Jamie never sought to challenge Mountain State’s objections to many of his discovery requests on the ground that they pertained only to his counterclaims. At that point, although Mountain State understood that Dr. Jamie had nominally filed a Rule 59(e) motion, the case was proceeding to trial without any discovery concerning the dismissed counterclaims and no effort by Dr. Jamie to bring his motion on for hearing. Then, following the close of discovery in mid-July 2006 and with the deadline for filing dispositive motions looming, Dr. Jamie finally scheduled hearing on his Rule 59(e) motion for July 28, 2006 – five months after it was filed.

At the July 28, 2006 hearing, the Circuit Court denied Dr. Jamie’s Rule 59(e) motion. Dr. Jamie’s counsel then orally moved for certification of the dismissal order as a final judgment pursuant to R. Civ. P. 54(b). The Circuit Court granted the motion by Order entered on September 1, 2006.

On September 13, 2006, Dr. Jamie filed with this Court an Emergency Motion by Sharooz S. Jamie, M.D. for Stay of Proceedings Pending Appeal, which was denied the

---

Memorandum of Law in support of the motion and the oral arguments made thereon.” Counsel for Dr. Jamie agreed to endorse the proposed order if certain minor changes were made, but then abruptly changed position, refusing not only to sign the proposed order, but also to explain what counsel suddenly found objectionable about it. See Letter to the Honorable George W. Hill, Jr. from Russell D. Jessee (Feb. 24, 2006)(describing events leading to submission of proposed order). Mountain State then submitted the proposed order to the Court with an explanatory transmittal letter. *Id.*

following day.<sup>20</sup> On September 15, 2006, Dr. Jamie filed his Petition for Appeal. Following that, Dr. Jamie filed two additional motions in an effort to avert the trial of Mountain State's affirmative claims scheduled to begin November 6, 2006.<sup>21</sup> Although this Court denied both motions, the Circuit Court postponed trial of Mountain State's claims until March 27, 2007, because of recent events that had affected available judicial resources. Once this Court granted Dr. Jamie's Petition for Appeal on February 13, 2007, proceedings in the Circuit Court were stayed, as it was divested of jurisdiction.

### III. STANDARD OF REVIEW

Technically, this is not an appeal from a R. Civ. P. 12(b)(6) dismissal, but from an order denying a motion pursuant to R. Civ.P. 59(e). In Syllabus Point 1 of *Cogar v. Lafferty*,<sup>22</sup> however, this Court recently reiterated that, "The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." This the applicable standard of review in this case is the standard of review applicable to orders dismissing claims or counterclaims pursuant to R. Civ. P. 12(b)(6).

---

<sup>20</sup> By this time, Goodwin & Goodwin had withdrawn as counsel for Dr. Jamie except to appeal the dismissal of his counterclaims. It is still somewhat difficult for Mountain State to discern how counsel can limit its representation of a party to representation on appeal when trial court proceedings are ongoing. Irrespective of intent, the effect of this was to create further delay, which again appears to be Dr. Jamie's primary strategy.

<sup>21</sup> See Petitioner's Motion to Expedite Response to Petition for Appeal and to Expedite Transmission of Petition and Record (Sept. 28, 2006); Emergency Motion by Sharooz S. Jamie, M.D. for Expedited Oral Presentation of Petition for Appeal (Oct. 23, 2006).

<sup>22</sup> 219 W. Va. 743, 639 S.E.2d 835 (2006)(quoting Syl. pt. 1, *Wickland v. American Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998)).

While appellate review of a circuit court's order granting a motion to dismiss is *de novo*,<sup>23</sup> motions to dismiss provide necessary relief in instances where a party requests relief that it cannot receive or attempts to enforce rights that it does not have.<sup>24</sup> Moreover, "[a] motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits."<sup>25</sup> Although the rules of pleading are liberally applied, this Court has stressed:

[L]iberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading. As stated in Lugar and Silverstein, *West Virginia Rules of Civil Procedure* (1960) at 75: "Simplicity and informality of pleading do not permit carelessness and sloth: the plaintiff's attorney must know every essential element of his cause of action and must state it in the complaint."<sup>26</sup>

Furthermore, the United States Supreme Court recently abrogated the standard of review for a motion to dismiss on which Appellant relies – namely, that "[d]ismissal of a claim under Rule 12(b)(6) is inappropriate 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'."<sup>27</sup> According to the United States Supreme Court, the phrase cited by Appellant "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: *once a claim has been stated adequately*, it may be supported by showing any set of facts consistent with the allegations in the complaint."<sup>28</sup> The correct standard is that a complaint must contain "plausible grounds" for its claims – that is, a

---

<sup>23</sup> *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 775, 461 S.E.2d 516, 521 (1995).

<sup>24</sup> *Id.* at 776, 461 S.E.2d at 522 (quoting *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir.1993)).

<sup>25</sup> *Id.*

<sup>26</sup> *Sticklen v. Kittle*, 168 W. Va. 147, 164, 287 S.E.2d 148, 157-58 (1981)(footnote omitted).

<sup>27</sup> *Bell Atlantic Corp. v. Twombly*, -- U.S. --, --, 127 S.Ct. 1955, 1968-69 (2007); see Appellant's Brief at 10 (quoting *Longwell v. Bd. of Ed. of County of Marshall*, 213 W. Va. 486, 583 S.E.2d 109, 111 (2003), in turn quoting cases that quote *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957)).

<sup>28</sup> *Bell Atlantic*, 127 S.Ct. at 1969 (emphasis added).

claim must include "enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]."<sup>29</sup> In other words, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>30</sup>

Applying this Court's and the United States Supreme Court's *Bell Atlantic* standards to this case, it is clear that the Circuit Court properly dismissed Dr. Jamie's nine counterclaims. Thus, Mountain State respectfully requests that such dismissal be affirmed by this Court.

#### IV. ARGUMENT

##### A. NONE OF DR. JAMIE'S COUNTERCLAIMS STATE VIABLE CAUSES OF ACTION.

Dr. Jamie has essentially argued that because he presented nine counterclaims, the sheer volume should have ensured that at least one claim would survive. Not a single counterclaim, however, states a claim upon which relief may be granted in this case. Accordingly, the Circuit Court properly dismissed all nine.

##### 1. Because Dr. Jamie Cannot Bring Claims on Behalf of His Patients, Two of His Claims Fail for Lack of Standing.

In Counts Six and Seven, Dr. Jamie attempted to bring against Mountain State claims on behalf of some of his patients for allegedly overcharging deductibles and co-payments to those persons.<sup>31</sup> Dr. Jamie expressly pleaded that he sought to enforce claims for "*participant*

---

<sup>29</sup> *Id.* at 1965; *see also id.* at 1965 n.3 ("While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant 'set out *in detail* the facts upon which he bases his claim,' *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief.")

<sup>30</sup> *Id.*, at 1964-65 (citations omitted).

<sup>31</sup> Second Amended Counterclaim at ¶¶ 37-47.

members/patients . . . under their contract of insurance with Blue Cross Blue Shield.”<sup>32</sup> As the Circuit Court therefore correctly concluded, Dr. Jamie had no standing as a matter of law to bring those claims.<sup>33</sup>

“[S]tanding is defined as ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’”<sup>34</sup> In this case, Dr. Jamie has no right to make a claim on Mountain State’s contracts with its members. This Court recently affirmed its “clear and long-standing precedent against third-party standing,” when it found that a circuit court “committed clear legal error” in permitting a third party to exercise rights that it did not have – in that case, a patient attempting to exercise rights on behalf of a doctor.<sup>35</sup> Here, a doctor has no right to exercise contract rights that belong to his patients.

Although he did not specifically plead it, Dr. Jamie’s argument that he is a third-party beneficiary to Mountain State’s contracts with its members,<sup>36</sup> is equally insufficient. In this regard, W. Va. Code § 55-8-12 provides:

If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

As recently as 2001, this Court reaffirmed its intention to interpret this statute strictly:

The foregoing statute expressly allows a person who is not a party to a contract to maintain a cause of action arising from that

---

<sup>32</sup> *Id.* at ¶¶ 38, 43. (emphasis added)

<sup>33</sup> Feb. 23, 2006 Hearing Tr. at 12:18-16:20.

<sup>34</sup> *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002)(quoting BLACK’S LAW DICTIONARY 1413 (7th ed. 1999)).

<sup>35</sup> *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003) (*per curiam*) (“One specific aspect of standing is that one generally lacks standing to assert the rights of another.”).

<sup>36</sup> Appellant’s Brief at 20-22.

contract only if it was made for his or her "sole benefit." We have repeatedly applied this statute and have consistently given force to the "sole benefit" requirement. In *Elmore v. State Farm Mut. Auto. Ins. Co.*, this Court rejected the argument that a third-party could assert a claim for breach of fiduciary duty against a tortfeasor's insurer finding that "[c]learly the insurance contract here was not made for the sole benefit of the plaintiff." 202 W. Va. 430, 438, 504 S.E.2d 893, 901 (1998).<sup>37</sup>

Likewise, in this case, the contracts for healthcare coverage between Mountain State and its members were not made for the "sole benefit" of any doctor. To the contrary, Mountain State's contracts with its members were made solely for the members' benefit – to manage their risk of high healthcare expenses.

Because alleged overcharging by Mountain State to its policyholders involves contractual rights to which he is a stranger, Dr. Jamie has no standing to assert claims in Counts Six and Seven.<sup>38</sup> Thus, this Court should affirm the Circuit Court's dismissal of Counts Six and Seven of Dr. Jamie's counterclaims.

---

<sup>37</sup> *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 403, 549 S.E.2d 266, 277 (2001).

<sup>38</sup> The cases that Appellant cites regarding the creditor beneficiary exception to the sole beneficiary rule are inapposite. Indeed, contrary to Appellant's contention that the Circuit Court failed to consider his arguments, it heard argument on the same cases now cited in Appellant's Brief and concluded that "those cases are not on point." Feb. 23, 2006 Hearing Tr. at 13:21-16:20. In all of the cases relied upon by Dr. Jamie, the contracts at issue were made, at least in part, to specifically benefit identified third parties. See *Hartmann v. Windsor Hotel Co.*, 132 W. Va. 307, 317-20, 52 S.E.2d 48, 53-54 (1949)(real estate broker may sue on sale contract granting him commission); *Pettus v. Olga Coal Co.*, 137 W. Va. 492, 497-98, 72 S.E.2d 881, 884 (1952)(union members who paid dues to union were beneficiaries of the union's contract with their employer on their behalf); *Craddock v. Apogee Coal Co.*, 166 Fed. Appx. 679, 683-84 (4th Cir. 2006)(employees could sue former employer for employee benefits that former employer had contractually obligated itself to pay in contract with employees' subsequent employer). Nothing in the Mountain State member contracts on which Dr. Jamie attempted to sue is analogous. Although Appellant argues in his brief – unsupported by record citation or any allegation in the Second Amended Counterclaim – that he "is paid compensation for services provided under [the insurance contracts between Mountain State and its members]," that statement is incorrect. Neither Appellant nor any other doctor is paid pursuant to a contract of insurance between Mountain State and one of its members. Under those contracts, Mountain State agrees to pay the member; it is the member's independent obligation to pay the provider. The Circuit Court recognized this distinction when it stated that a payment to Dr. Jamie for services "is between him and his patient, though. His patient is required to pay him, owes him. . . . his claim is against the patient, not against Mountain State." Feb. 23, 2006 Hearing Tr. at 16:1-8.

**2. Because the Alleged Defamatory Statement Does Not Satisfy the Elements of any Cause of Action, Dr. Jamie's Defamation Claim Fails as a Matter of Law.**

In Count Nine, Dr. Jamie attempted to state a claim of slander (defamation) by alleging that a Mountain State auditor said to several of Dr. Jamie's employees, "Dr. Jamie told you to change the medical CPT code because the BCBS reimbursement was low."<sup>39</sup> As the Circuit Court correctly concluded, even if this allegation is accepted as true, Dr. Jamie did not state a claim for defamation.

To properly plead defamation, Dr. Jamie must allege "(1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on part of the publisher; and (6) resulting injury."<sup>40</sup> Based on the statement pleaded by Dr. Jamie, the Circuit Court determined that it was not defamatory as a matter of law, stating that "I don't think it is defamatory in the first place."<sup>41</sup> The Circuit Court did not accept as fact anything alleged by Mountain State, but rather ruled on the legal sufficiency of the single statement that Dr. Jamie claimed to be defamatory. As the circuit court said, "The statement speaks for itself."<sup>42</sup>

---

<sup>39</sup> Second Amended Counterclaim at ¶ 53.

<sup>40</sup> Syl. Pt. 1, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984).

<sup>41</sup> Feb. 23, 2006 Hearing Tr. at 24:19-20; see Syl. Pt. 2, *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293 (1994) ("A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning.") (internal quotation marks and citations omitted).

<sup>42</sup> Feb. 23, 2006 Hearing Tr. at 27:21-24; see also *id.* at 28:5 (THE COURT: "No, it wasn't [accusing him of fraud]."); *id.* 28:11 (THE COURT: "[I]t doesn't sound defamatory.").

The Circuit Court further concluded that “there weren’t any damages because nobody believed it.”<sup>43</sup> Dr. Jamie expressly pleaded that his employees immediately “knew that the statements were and are entirely false.”<sup>44</sup> The Circuit Court, accepting this as true, reiterated that Dr. Jamie had pleaded himself out of a claim:

THE COURT: And even if [the statement] is [defamatory], it was made to a limited group of people, and they didn’t believe it in the first place. So there is no defamation, there is no damage. Without damage, there is no cause of action. There can’t be any damage.

And he pleads that it was damage to reputation in the community, whatever that means, but it wasn’t within the community; it was within the group of people to whom [Mountain State’s auditor] made the statement. That is what [Dr. Jamie] pleads. The employees knew that it wasn’t true, and there is no allegation that it was published to the community.<sup>45</sup>

Virtually identical facts led this Court to affirm dismissal of a defamation claim in *Miller v. City Hospital, Inc.*<sup>46</sup> In *Miller*, the two persons who allegedly heard the defamatory statement testified that they did not believe it.<sup>47</sup> This Court concluded that “the record does not demonstrate any harm to [plaintiff’s] reputation,” and, thus, there was “no evidence of one of the essential elements of a defamation claim.”<sup>48</sup> Here, Dr. Jamie affirmatively pleaded that the allegedly defamatory statement was not believed. Accordingly, the Circuit Court correctly

---

<sup>43</sup> *Id.* at 24:21-22.

<sup>44</sup> Second Amended Counterclaim at ¶ 54.

<sup>45</sup> Feb. 23, 2006 Hearing Tr. at 28:13-23.

<sup>46</sup> 197 W. Va. 403, 475 S.E.2d 495 (1996) (*per curiam*).

<sup>47</sup> *Id.* at 411, 475 S.E.2d at 503 (“only two persons were present when the statement was made, and affidavits from both of these persons stated that they did not believe the statement to be true”).

<sup>48</sup> *Id.*

determined that – based solely on Dr. Jamie’s own allegations – his slander claim “doesn’t amount to a cause of action.”<sup>49</sup>

Nothing in Appellant’s Brief refutes the correctness of this ruling.<sup>50</sup> At best, Dr. Jamie repeats the absurd contention that “each employee did not know what Dr. Jamie may or may not have said to the other employee.”<sup>51</sup> Appellant fails for a second time, however, to provide any explanation for why this makes a statement damaging when all who heard it immediately knew it was “entirely false.” And, there can be no explanation, because if no one believed the statement to begin with, it could do no harm.<sup>52</sup>

Additionally, Appellant mischaracterizes the decision in *Bell v. National Republican Congressional Committee*,<sup>53</sup> asserting that it stands for the proposition if a plaintiff proves only the element of publication, the plaintiff also has proven injury in all cases.<sup>54</sup> In fact, *Bell* concerned a limited category of statements that are defamatory *per se* – in that case, an accusation that the plaintiff was a sex offender.<sup>55</sup> Only statements that are “obviously and materially harmful to reputational interests,” such as accusations of serious sexual misconduct or

---

<sup>49</sup> Feb. 23, 2006 Hearing Tr. at 29:8-10.

<sup>50</sup> Because the Circuit Court correctly dismissed Dr. Jamie’s slander claim on the grounds that the alleged statement was not defamatory as a matter of law and that Dr. Jamie’s own pleading precluded injury and damages, Dr. Jamie’s arguments to this Court about whether the statement was privileged or negligently made and whether the claim was time-barred (*see* Appellant’s Br. at 23-26) are irrelevant. Even if he were correct in those arguments – which he is not – he provides nothing to refute the valid grounds on which his defamation claim was dismissed.

<sup>51</sup> Appellant’s Brief at 26; *see also* Feb. 23, 2006 Hearing Tr. At 25:2-4.

<sup>52</sup> *Miller*, 197 W. Va. at 411, 475 S.E.2d at 504.

<sup>53</sup> 187 F. Supp. 2d 605 (S.D. W.Va. 2002).

<sup>54</sup> Appellant’s Br. at 26.

<sup>55</sup> 187 F.Supp.2d at 616 (finding that accusation of being a sex offender “is capable of defamatory meaning”).

crimes punishable by imprisonment are defamatory *per se*.<sup>56</sup> Nothing in the stilted statement that Dr. Jamie alleges was defamatory constitutes defamation *per se*. Thus, Dr. Jamie was required to plead all six elements of defamation, including a defamatory statement and resulting injury, but he failed to do so. Because Dr. Jamie's pleading revealed that he could not establish at least two elements of defamation, the Circuit Court properly dismissed his defamation counterclaim. Thus, this Court should affirm the Circuit Court's dismissal of Count Nine of Dr. Jamie's Counterclaims.

**3. Dr. Jamie's Fraud Counterclaims Fail to Assert Facts, With the Requisite Particularity, that Would Constitute Actionable Fraud.**

Although difficult to discern, Dr. Jamie appears to have claimed in Count Five that Mountain State fraudulently underpaid him when it reimbursed him for only one unit of a test panel after he erroneously – albeit purposefully – billed Mountain State for nineteen units of that panel.<sup>57</sup> The Circuit Court dismissed Count Five, because Dr. Jamie broadly alleged fraud, but then provided only a single example that contained no indication of fraud.<sup>58</sup>

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” R. Civ. P. 9(b). Rule 9(b) is not without meaning:

The charge of fraud is of such gravity that the strict requirements of Rule 9(b), R.C.P., have been included in the procedural rules as an exception to the principles of brevity and simplicity in pleading called for in Rule 8(e)(1). The rationale for these requirements is to permit the party charged with fraud the opportunity to prepare a defense.<sup>59</sup>

---

<sup>56</sup> See *id.* and cases cited therein.

<sup>57</sup> Second Amended Counterclaim at ¶¶ 32-36.

<sup>58</sup> Feb. 23, 2005 Hearing Tr. at 39:9-15.

<sup>59</sup> *Hager v. Exxon Corp.*, 161 W. Va. 278, 283, 241 S.E.2d 920, 923 (1978).

Furthermore, while fraud has been defined broadly at times, it must embody some intentional misrepresentation or concealment.<sup>60</sup>

In Count Five, Dr. Jamie's allegation that Mountain State "fraudulently, consistently and routinely underpaid Dr. Jamie for his services,"<sup>61</sup> is precisely the type of bare allegation of fraud that Rule 9(b) proscribes. The single example that Dr. Jamie pleaded did not allege any misrepresentation or concealment on the part of Mountain State.<sup>62</sup> If anything, Dr. Jamie pleaded misrepresentation by himself.

His pleading admits that he erroneously charged \$820 to Mountain State for nineteen units of a blood test panel, "which was supposed to be 1 unit."<sup>63</sup> The pleading then alleges that Mountain State's regular payment for one unit of the blood test panel was too low.<sup>64</sup> Nowhere in those allegations, however, does Dr. Jamie plead that Mountain State intentionally concealed or misrepresented anything, including the amount of payment, which he clearly knew because he received it.<sup>65</sup> Thus, to the extent that Dr. Jamie attempted to support his broad allegation of fraud with a particular example, that example simply alleges no fraud on the part of Mountain State. Accordingly, the Circuit Court correctly dismissed Count Five.

---

<sup>60</sup> See, e.g., *Gerver v. Benavides*, 207 W.Va. 228, 232, 530 S.E.2d 701, 705 (1999) (*per curiam*) ("Actual fraud is intentional, and consists of an intentional deception or misrepresentation to 'induce another to part with property or to surrender some legal right, and which accomplishes the end designed.'") (quoting *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 76, 285 S.E.2d 679, 683 (1981)).

<sup>61</sup> Second Amended Counterclaim at ¶ 32.

<sup>62</sup> *Id.* at ¶¶ 33-35.

<sup>63</sup> *Id.* at ¶ 33.

<sup>64</sup> *Id.* at ¶ 35. Dr. Jamie alleged that the payment he should have received was \$820/19 (the amount that he overbilled divided by the quantity of panels that he overbilled). *Id.* In actuality, Dr. Jamie was paid for procedures according to what was the usual, customary and reasonable amount for them (as is paid to all other physicians participating in Mountain State's networks).

<sup>65</sup> Appellant's long discussion (Appellant's Brief at 18-19) of the parameters of Rule 9(b), based on a concurring opinion, thus, is beside the point.

Dr. Jamie's Count Four also alleges fraud, but also fails to allege any misrepresentation or concealment by Mountain State. As in Count Five, in Count Four, Dr. Jamie alleged that Mountain State withheld or offset payments that Dr. Jamie contends were due him,<sup>66</sup> but he nowhere alleges that Mountain State misrepresented or concealed anything from him.<sup>67</sup> Thus, Count Four fails to state a claim for fraud in the same way that Count Five does.

The Circuit Court properly analyzed Dr. Jamie's fraud counterclaims under the rule requiring pleading by particularity. Thus, this Court should affirm dismissal of Counts Four and Five of Dr. Jamie's counterclaims.

**4. Dr. Jamie's "Negligence" Counterclaim Is Not Predicated Upon Any Common Law Duty Owed by Mountain State, But Instead Is Based Solely Upon Contractual Provisions**

In Count Eight, Dr. Jamie claimed that Mountain State breached its "duty as an insurance provider" by "failing to reimburse" or "underpaying" him.<sup>68</sup> Any duty that Mountain State had to make payments to Dr. Jamie, however, arose *only* under his contracts with Mountain State.<sup>69</sup> Mountain State owed Dr. Jamie no common law duty to make any payments to him.

As this Court has observed, "[t]ort law is not designed . . . to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement."<sup>70</sup> Thus, where the damages sought were "within the contemplation of the parties when framing their agreement,"

---

<sup>66</sup> Second Amended Counterclaim at ¶¶ 26-30.

<sup>67</sup> Nor can Dr. Jamie in good faith deny that Mountain State documented in Explanations of Benefits ("EOBs") its response to every claim from him. Thousands of pages of EOBs were produced in discovery by both Dr. Jamie and Mountain State.

<sup>68</sup> Second Amended Counterclaim at ¶¶ 49-50.

<sup>69</sup> Appellant's argument that he could be alleging breach of obligations under W. Va. Code § 33-45-2 or "the duty of good faith and fair dealing" (Appellant's Brief at 17), thus, adds nothing. Both of those duties are purely contractual duties.

<sup>70</sup> *Silk v. Flat Top Const., Inc.*, 192 W.Va. 522, 526, 453 S.E.2d 356, 360 (1994)(citations omitted).

and no facts are alleged “showing a breach of any [duty owed by the defendants to the plaintiffs] imposed by law” – as opposed to a duty imposed by contract – no tort claim exists.<sup>71</sup>

Appellant’s discussion of R. Civ. P. 8(e)(2)’s permission to plead alternative theories is inapplicable.<sup>72</sup> Dr. Jamie is not trying to plead alternative theories; he is trying to plead the same theory. Appellant responds to this Court’s proscription in *Silk* of pleading negligence based solely on an alleged breach of contract, with the argument “that is not what [Dr. Jamie] is attempting to do in the instant case.” That is precisely, however, what Dr. Jamie attempted to do in Count Eight. Dr. Jamie expressly pleaded that Mountain State “breached its duty by failing to reimburse him for services rendered or underpaying him for services rendered.”<sup>73</sup> As noted, Mountain State’s duty to pay Dr. Jamie arose only from its contracts with him.<sup>74</sup>

Dr. Jamie’s shotgun approach to asserting as many counterclaims as a creative mind might conceive in order to increase the time and expense to Mountain State in securing damages for the overpayments resulting from Dr. Jamie’s overbilling is probably no more apparent than his attempt to place a tort costume on a contractual cause of action. The Circuit Court properly held that Dr. Jamie’s counterclaim for tort was predicated upon no common law duty owed by Mountain State to Dr. Jamie. Thus, this Court should affirm the Circuit Court’s dismissal of Count Eight of Dr. Jamie’s counterclaims.

---

<sup>71</sup> *Id.* (citations and internal quotations omitted)

<sup>72</sup> Appellant’s Brief at 15-16.

<sup>73</sup> Second Amended Counterclaim at ¶ 50.

<sup>74</sup> For that reason, *Homes v. Monongahela Power Co.*, 136 W. Va. 877, 69 S.E.2d 131 (1952), cited by Appellant, is inapposite. *Homes* merely finds that if a plaintiff alleges “wrongful acts [that are] in themselves tortious,” the plaintiff may state a claim in tort. 136 W. Va. at 884, 69 S.E.2d at 136. Dr. Jamie alleges nothing wrongful that is not based on contract.

**5. The Implied Covenant of Good Faith and Fair Dealing  
is Not a Cause of Action Independent from a Cause of  
Action for Breach of Contract.**

In Count Three, Dr. Jamie alleged a breach of the “implied covenant [in every contract] to act in good faith and deal fairly with the parties.”<sup>75</sup> He alleged that Mountain State breached the covenant by failing to reimburse him under his contract and by failing to timely cancel his contract<sup>76</sup> – two issues that are expressly covered in the contract that Dr. Jamie attached to his Second Amended Counterclaim.<sup>77</sup> Even assuming, *arguendo*, that such an implied covenant existed,<sup>78</sup> where a party claims the benefit of an express contractual term, then it cannot rely on any implied covenant of good faith addressing the same term.<sup>79</sup> “An implied contract and an express one covering the identical subject matter cannot exist at the same time. If the latter exists the former is excluded.”<sup>80</sup> Otherwise, in every case where a breach of contract is alleged, the party asserting the breach could likewise join a separate claim for breach of the covenant of good faith and fair dealing. Here, as noted, Dr. Jamie’s contract expressly addressed the subjects (payment and termination) of which he complained in Count Three.

---

<sup>75</sup> Second Amended Counterclaim at ¶¶ 19-24.

<sup>76</sup> *Id.* at ¶¶ 22-23.

<sup>77</sup> See Participation Agreement §§ I (Payments for Covered Services), IV (Term and Termination), attached as Ex. A to Second Amended Counterclaim.

<sup>78</sup> This Court has declined to extend such an implied duty to all contracts and, indeed, has rejected it in the context of at-will employment contracts. See *Miller v. Mass. Mut. Life Ins. Co.*, 193 W. Va. 240, 244, 455 S.E.2d 799, 803 (1995) (*per curiam*).

<sup>79</sup> *Tobin v. Ravenswood Aluminum Corp.*, 838 F. Supp. 262, 273-74 (S.D. W. Va. 1993) (applying West Virginia law). Similarly, the official comment to the West Virginia Uniform Commercial Code (“UCC”) makes clear that, in the realm of contracts for sales of goods, the statutorily imposed duty of good faith “does not support an independent cause of action,” but “merely directs a court towards interpreting contracts.” W. Va. Code § 46-1-304, official cmt. 1; see also *id.* (UCC does not impose “a separate duty of fairness and reasonableness which can be independently breached”).

<sup>80</sup> Syl. Pt. 3, *Rosenbaum v. Price Const. Co.*, 117 W. Va. 160, 184 S.E. 261 (1936).

Dr. Jamie attempted to state a claim that does not exist in the law.<sup>81</sup> Thus, this Court should affirm the Circuit Court's dismissal of Count Three of Dr. Jamie's counterclaims.

**6. W. Va. Code § 33-45-2 Has No Application to the Circumstances of This Case.**

In Count Two, Dr. Jamie sought to apply provisions of W. Va. Code § 33-45-2, which governs retroactive denials of previously paid claims, to the adjustments that Mountain State made to Dr. Jamie's payments after it discovered his admitted overbilling.<sup>82</sup> What Dr. Jamie erroneously characterized as claim denials were, in fact, remittance adjustments (similar to offsets) to subsequent payments in order to recoup overpayments Dr. Jamie received when he billed for blood test panels that he did not perform.<sup>83</sup>

In his pleading, Dr. Jamie admitted that he should not have billed for nineteen units of a single blood test panel,<sup>84</sup> just like a lawyer should not bill the State for three trips when he or she traveled once to attend hearings for three clients; he should have billed and been paid for only one unit. As such, he admits that Mountain State did not deny any purportedly proper claim. To the contrary, Mountain State initially paid the entire claim as billed, and upon discovering the Dr. Jamie had improperly inflated the value by a factor of eighteen – for procedures he admittedly

---

<sup>81</sup> The federal decision cited by Appellant, *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), does not address that principle, and therefore is inapposite. In that case, the Fourth Circuit first considered whether North Carolina law applied a duty of good faith to the exercise of an express termination provision. Upon determining that North Carolina cases were inconclusive, the court concluded that the plaintiff should have been able to present both its theory of bad faith failure to notify of plans to terminate a contract and its theory of breach of contract for failure to perform contract obligations after termination “[t]o the extent that each theory had legal validity.” 649 F.2d at 988-91 (emphasis added). Here, Dr. Jamie's theory in Count Three that he has an independent claim for the breach of the implied duty of good faith and fair dealing has no legal validity under West Virginia law.

<sup>82</sup> *Id.* at ¶¶ 15-17. See W. Va. Code § 33-45-2(a)(7) (“A previously paid claim may be retroactively denied only in accordance with this subdivision.”)(emphasis added)

<sup>83</sup> Complaint at ¶ 26. Dr. Jamie's Participation Agreement expressly permitted those adjustments. See Participation Agreement at § II.H, attached as Ex. A to Second Amended Counterclaim.

<sup>84</sup> Second Amended Counterclaim at ¶ 33.

did not perform – simply adjusted the payment by offsetting the overpaid amount against later payments owed to him. Consequently, Dr. Jamie’s assertion that “[t]he intent of the statute is to prevent health plans from improperly withholding monies from providers without their consent”<sup>85</sup> is irrelevant. There could be nothing improper about recouping payments made for admittedly erroneous claims.<sup>86</sup> He therefore could not state a claim under that statute.

Dr. Jamie further misconstrued the scope of W. Va. Code § 33-45-2 when he argued that it applied to adjustments made when he claimed not to be under contract with Mountain State.<sup>87</sup> The statute applies only to medical providers who are under contract with insurers.<sup>88</sup> Accordingly, if adjustments were made to payments not governed by a contract, as Dr. Jamie pleaded, the adjustments would not be governed by W. Va. Code § 33-45-2.

The dismissal of Dr. Jamie’s counterclaim based upon a correct legal interpretation of the scope of W. Va. Code § 33-45-2. Thus, this Court should affirm the Circuit Court’s dismissal of Count Two of Dr. Jamie’s counterclaims.<sup>89</sup>

#### **7. Dr. Jamie Failed to State Any Breach of Contract Claim.**

In Count One, Dr. Jamie pleaded that Mountain State failed to properly terminate his contract and, thereafter, withheld and offset payments to him.<sup>90</sup> The claim shows a fundamental misunderstanding of contract law.

---

<sup>85</sup> Appellant’s Brief at 22 (emphasis added).

<sup>86</sup> As discussed, Dr. Jamie has now admitted in deposition that he over-billed Mountain State for blood test panels to recoup what he believed were losses when he treated patients covered by governmental programs.

<sup>87</sup> *Id.* at ¶ 17.

<sup>88</sup> W. Va. Code § 33-45-2(a)(referring to obligations in “provider contract[s]”).

<sup>89</sup> Even assuming, *arguendo*, that W. Va. Code § 33-45-2(a)(7) were applicable, it would not apply to claims to self-funded ERISA plans, claims in the Federal Employee Program, or claims by members of other, non-Mountain State Blue Cross Blue Shield programs. See W. Va. Code § 33-45-1(7)(defining “insurer” subject to Insurance Code).

Dr. Jamie pleaded that his contract should have been cancelled, but, cancellation notwithstanding, Mountain State was to remain contractually obligated to make payments to him.<sup>91</sup> Dr. Jamie therefore wrongly asked the Circuit Court to allow him to bring a contract claim based on a contractual obligation that he pleaded had been terminated.<sup>92</sup>

The Participation Agreement that Dr. Jamie quoted and attached to his Counterclaim as Exhibit A created the only obligation that Mountain State had to pay Dr. Jamie directly. Assuming Dr. Jamie's Participation Agreement should have been cancelled on December 14, 2003, as Dr. Jamie pleaded,<sup>93</sup> Mountain State's obligation to pay him ceased.<sup>94</sup> Any failure by Mountain State to pay Dr. Jamie after he no longer was under contract with Mountain State thus would not be wrongful, because Dr. Jamie would have no entitlement to any payments. In other words, if Mountain State "withheld" or "offset" payments to Dr. Jamie, they were payments to which he was not entitled according to his own pleading. Accordingly, Dr. Jamie did not state a claim for breach of contract when he claimed entitlement to contract payments after he pleaded he had no contract.

The issue presented by Count One is whether Dr. Jamie alleged sufficient facts that, if truthful, stated a viable claim for breach of contract. The Circuit Court properly determined that

---

<sup>90</sup> Second Amended Counterclaim at ¶¶ 7-13. Dr. Jamie also pleaded an identical claim in Count Four, except there he attempted to plead it as fraud, but as shown *supra*, Count Four fails to state a claim of fraud. Moreover, Dr. Jamie also tried to plead the same claim as one for breach of the implied covenant of good faith in Count Three, which, as also shown *supra*, also fails to state a claim.

<sup>91</sup> Second Amended Counterclaim at ¶¶ 17, 24 (alleging Mountain State wrongfully withheld and offset payments due to Dr. Jamie).

<sup>92</sup> See *Adkins v. Aetna Life Ins. Co.*, 130 W.Va. 362, 378, 43 S.E.2d 372, 381 (1947) ("Courts may not alter or rewrite the contracts of the parties, or insert provisions which the parties themselves have not seen fit to adopt.")

<sup>93</sup> *Id.* at ¶ 10.

<sup>94</sup> If a doctor is not a participating provider under contract with Mountain State, any Mountain State members that the doctor sees are reimbursed directly from Mountain State, and those members are responsible for satisfying their own contractual obligations to the doctor.

Dr. Jamie's contract claim, as pleaded, failed to state any claim. Thus, this Court should affirm the Circuit Court's dismissal of Count One of Dr. Jamie's counterclaims.

**B. THE CIRCUIT COURT PROPERLY DISMISSED DR. JAMIE'S COUNTERCLAIMS WITH PREJUDICE.**

**1. Dr. Jamie Failed to Preserve the Dismissal With Prejudice Issue for Appeal.**

As an initial matter, Dr. Jamie failed to record an objection to the dismissal with prejudice at the time the circuit court considered and ruled on Mountain State's Motion to Dismiss, and, thus, he failed to preserve the issue for appeal.

This Court firmly abides by the principle that "[w]here objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal."<sup>95</sup> The rationale behind this "raise or waive" rule is "to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error."<sup>96</sup>

In this case, Mountain State's Motion to Dismiss explicitly requested that said dismissal be with prejudice.<sup>97</sup> Neither in Dr. Jamie's opposition brief nor in his oral argument did he specifically object to dismissal with prejudice or argue that he should be allowed to re-plead for the fourth time if Mountain State were successful.<sup>98</sup> Accordingly, Dr. Jamie did not preserve his assignment of error regarding dismissal with prejudice for appeal.

---

<sup>95</sup> Syl. Pt. 1, *State Rd. Comm'n v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964); *see also* Syl. Pt. 4, *State v. Browning*, 199 W. Va. 417, 485 S.E.2d 1 (1997) ("This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record.").

<sup>96</sup> *Wimer v. Hinkle*, 180 W. Va. 660, 663, 379 S.E.2d 383, 386 (1989).

<sup>97</sup> Motion to Dismiss at 1, 16.

<sup>98</sup> Dr. Jamie objected generally to the dismissal following the Circuit Court's oral ruling, but he never specifically objected to the dismissal with prejudice by, for example, making any argument that he should be allowed to re-plead any of the dismissed claims. Feb. 23, 2006 Hearing Tr. at 46:9-12.

**2. A Rule 12(b)(6) Dismissal May Be Effectuated With Prejudice.**

In Syllabus Point 5 of *Sprouse v. Clay Communication, Inc.*, this Court held that:

[i]n all future cases the dismissal of an action under Rule 12(b)(6) W. Va. RCP for failure to state a claim upon which relief can be granted shall be a bar to the prosecution of a new action grounded in substantially the same set of facts, unless the lower court in the first action specifically dismissed without prejudice.<sup>99</sup>

It is clear, then, that a Rule 12(b)(6) dismissal is always with prejudice unless it is specifically made without prejudice: “The dismissal of an action under Rule 12(b)(6) is a bar to the prosecution of a new action grounded in substantially the same set of facts, unless the lower court in the first action specifically dismissed without prejudice.”<sup>100</sup>

*Sprouse* overruled the final phrase of Syllabus Point 4 of *United States Fidelity and Guaranty Company v. Eades*,<sup>101</sup> where the Court had stated that 12(b)(6) dismissals are without prejudice.<sup>102</sup> In *Sprouse*, this Court considered conflicting West Virginia case law on Rule 12(b)(6) dismissals, including Syllabus Point 4 of *USF&G*, and declared that “[i]n all future cases,” Rule 12(b)(6) dismissals would be with prejudice unless otherwise stated.<sup>103</sup>

Dismissal of Dr. Jamie’s Second Amended Counterclaim was further proper to avoid any additional delay for Mountain State to have its day in court. Although leave to amend or re-

---

<sup>99</sup> Syl. Pt. 5 (in part), *Sprouse v. Clay Commc’n, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975).

<sup>100</sup> F. Cleckley, R. Davis, L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 2D at § 12(b)(6)[2][a] (2006)(footnote omitted).

<sup>101</sup> 150 W. Va. 238, 144 S.E.2d 703 (1965).

<sup>102</sup> 158 W. Va. at 457-61, 211 S.E.2d at 694-96.

<sup>103</sup> *Id.* Although the Court referred to Syllabus Point 4 of *USF&G* in *Rhododendron Furniture & Design v. Marshall*, 214 W. Va. 463, 590 S.E.2d 656 (2003) (*per curiam*), cited by Appellant, that case required for its decision only the first sentence of Syllabus Point 4, regarding whether a motion is properly considered as brought under R. Civ. P. 12(b)(6) or 56. The latter section of Syllabus Point 4 of *USF&G* as quoted in *Rhododendron Furniture* therefore was *dicta* in that context. See 214 W. Va. at 466, 590 S.E.2d at 659.

plead should be "freely given when justice so requires," "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment" are all valid reasons for a court to deny leave to amend.<sup>104</sup>

In this case, Dr. Jamie was not entitled to re-plead his obviously defective claims when he was unable to cure the defects in two amendments. In short, he was not entitled to a fourth bite at the apple. Indeed, Dr. Jamie showed no interest in re-pleading his counterclaims for the five months that his Motion to Alter or Amend languished. Even at this late date, Dr. Jamie has yet to explain what he would have re-pleaded if he had been given the opportunity. Mountain State respectfully suggests that the reason Dr. Jamie has failed to make such a proffer is his awareness that any attempted amendment would be futile, since, as demonstrated above, the defects in his Second Amended Counterclaim cannot be cured. It is thus clear that his current objection to the bar to re-pleading is merely another of his attempts to delay having to face Mountain State in court and defend his indefensible actions.

## V. CONCLUSION

The Circuit Court properly analyzed each of Dr. Jamie's counterclaims and found each, as a matter of law, to be insufficient as a matter of law to state claims upon which relief could be awarded. The Circuit Court's analysis, particularly under the United States Supreme Court's recent decision in *Bell Atlantic*, was sound.

---

<sup>104</sup> *Foman v. Davis*, 371 U.S. 178, 182 (1962).

WHEREFORE, the Appellee, Highmark West Virginia, Inc., d/b/a Mountain State Blue Cross Blue Shield, respectfully requests that this Court affirm the dismissal, with prejudice, of all of the counterclaims by the Appellant, Sharooz S. Jamie, M.D., in order that it will be able to timely proceed to trial on its claims for repayment of sums paid as a result of Dr. Jamie's fraudulent practice of overbilling.

**HIGHMARK WEST VIRGINIA INC. d/b/a  
MOUNTAIN STATE BLUE CROSS  
BLUE SHIELD**

By Counsel



Ancil G. Ramey, Esquire (WVSB #3013)  
Kara L. Cunningham, Esquire (WVSB #8148)  
Russell D. Jessee, Esquire (WVSB #10020)

STEPTOE & JOHNSON PLLC

P.O. Box 1588

Charleston, WV 25326-1588

Telephone (304) 353-8112

Telecopier (304) 353-8180

*Counsel to Appellee*